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IN THE

SUPREME COURT OF THE UNITED STATES

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SUPREME COURT, U.S.

OCTOBER TERM, 1994

PEOPLE OF THE STATE OF MICHIGAN,

PETITIONER,

vs.

DARRYL STEVEN GOSS,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF MICHIGAN

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE CASE

Respondent adopts the petitioner's statement of the case, except as may be modified elsewhere within this brief in opposition.

REASONS FOR DENYING THE WRIT

PETITIONER'S ARGUMENT THAT JUDICIAL ECONOMY PERMITS PROSECUTORIAL USE OF COLLATERAL ESTOPPEL/RES JUDICATA IN A FELONY-MURDER CRIMINAL TRIAL FAILS TO OUTWEIGH DEFENDANT'S FEDERAL AND STATE CONSTITUTIONAL DUE PROCESS OF LAW, RIGHT TO JURY TRIAL AND PRESUMPTION OF INNOCENCE

Respondent, DARRYL STEVEN GOSS, awaits retrial on the charge of aiding and abetting felony-murder, MICH. COMP. LAWS ANN. 750.316; MICH. STAT. ANN. 28.548, as ordered by the Michigan Supreme Court on June 17, 1991. *People v. Darryl Steven Goss, 437 Mich 1021, 470 N.W.2d 400 (1991).*

At a pretrial hearing, the prosecution motioned the trial court for permission to use collateral estoppel or res judicata as to the armed robbery element of the felony murder. For purposes of "judicial economy" the prosecution requested the trial court to direct the new jury that they are forbidden to consider the element of armed robbery of felony-murder, inasmuch as defendant had been found guilty of armed robbery in a prior case. Defense argued that this would impermissibly prejudice and inflame the jury, and deny defendant due process of law. Honorable George W. Crockett, III , of the

trial court agreed, holding that the prosecution's request would be unfair and would indeed deny defendant due process of law. (MT, 6-10, 16-17).

The prosecution obtained a stay of the trial from the Michigan Court of Appeals. At oral argument, defense argued the superiority of the constitutional rights and guarantees to a fair and impartial jury, presumption of innocence and due process of law, relying in part, on the analysis of a strikingly similar issue by the Supreme Court of New Jersey, which held:

> The affirmative use of collateral estoppel against a defendant in a criminal prosecution is not predicated upon any constitutional mandate. In this case, to illustrate, the use by the state of the defendant's prior conviction was offered for reasons of convenience and expediency. Its approval by the trial court was based narrowly upon notions of judicial economy and the belief that defendant would not be unfairly treated since he had already had the opportunity fully to try the facts in issue in a preceding case and could offer additional proofs in the pending trial.
>
> It is our view that the use of defendant's prior conviction in the trial of this case constituted collateral estoppel against the defendant and impinged upon his constitutional right of trial by jury. *Citing, US CONST. Am VI, N. J. Const. (1947), Art. I, Sec. 9.* Accordingly, we reverse the conviction below and remand the matter for new trial.
>
> (T)hese cases emphasize that the jury right includes certain intangible - but very real - benefits to a defendant that are lost if

a jury is induced to think in terms of guilt, instead of presumed innocence, before its deliberations have begun.

Accordingly, we conclude that collateral estoppel, applied affirmatively against a defendant in a criminal prosecution, violates the right to trial by jury in that not only does it seriously hobble the jury in its quest for truth by removing significant facts from the deliberative process, but it constitutes a strong, perhaps irresistible, gravitational pull towards a guilty verdict, which is utterly inconsistent with the requirement that a jury remain free and untrammeled in its deliberations. Hence, the collateral estoppel doctrine, which serves to establish virtually conclusive evidence of a critical element of criminal guilt, cripples the jury in the discharge of its essential responsibilities contrary to the constitutional guarantees of the jury right in a criminal trial.

These considerations lead us to conclude that the right to a jury in a criminal trial ordinarily includes the right to have the same trier of the facts decide all of the elements of the charged offense. Unless the same jury is permitted to deliberate meaningfully upon all of the issues that are crucial to a verdict of guilt or innocence of the particular crime charged, a defendant will not have secured the jury right contemplated by the Constitution. Collateral estoppel against a defendant in the context of a criminal trial is inconsistent with this proposition.

State v. Ingenito, 87 N.J. 204, 209, 211-212; 432 A 2d 912, 914-919 (1981), emphasis added.

After submission of briefs and oral argument, the Michigan Court of Appeals , in an opinion written by Honorable John Shepherd, affirmed the trial court, holding:

(A)ccordingly, in the clash between the principle of collateral estoppel and the constitutional right to trial by jury, collateral estoppel must give way to permit a defendant's unfettered exercise of the constitutional right to trial by jury.

Applying this rule to the present case, the prosecution is thus barred from introducing defendant's conviction of armed robbery to establish the underlying felony in his retrial for felony murder. Even though the instant case satisfies the requirements of collateral estoppel, defendant's constitutional right to trial by jury entitles him at retrial to have the new jury decide the facts and determine his guilt or innocence regarding all the elements of felony murder. The application of collateral estoppel in this case must yield to this fundamental constitutional right, even if, as the prosecution contends, proving the armed robbery element may be considered "to waste valuable judicial resources in terms of time and orderliness" and even if the trial court can instruct the jury not to consider defendant's conviction for armed robbery as evidence that he had the requisite intent for felony muder. Because questions of judicial economy and efficiency are subordinate to the fundamental constitutional rights of a criminal defendant, we reject the prosecutor's claim that collateral estoppel bars relitigation of the underlying charge of armed robbery. Because questions of judicial economy and efficiency are subordinate to the fundamental constitutional rights of a criminal defendant, we reject the prosecutor's claim that collateral estoppel bars relitigation of the underlying charge of armed robbery.

People v. Darryl Steven Goss, 200 Mich App 9, 503 N.W. 2d 682, 687 (1993), emphasis added.

The Michigan Supreme Court upheld the Michigan Court of Appeals and the trial court. The lead opinion authored by Justice Charles Levin, concurred by Chief Justice Michael Cavanagh, held:

> (T)he question presented is whether Goss is barred by the doctrines of res judicata and collateral estoppel from relitigating the issue whether he commited the armed robbery at a retrial for first degree felony murder. We hold that he is not so barred, and that he may do so.

The Michigan Supreme Court analyzed that:

> (T)he rights of a person accused of a felony to trial by jury and to due process of law include the right to determination by the jury whether the prosecution has proven beyond a reasonable doubt every element of the charge. **The judge may not direct a verdict either in whole or in part.**
>
> The prosecutor insists that these commands would not be violated by applying the doctrines of res judicata or collateral estoppel against Goss because a jury has already found beyond a reasonable doubt that Goss committed an armed robbery.
>
> Whenever a defendant is charged with different crimes that have identical elements, the jury must make an independent evaluation of each element of each charge. A jury in a criminal case may reach different conclusions concerning an identical element of two different offenses. ***Citing, People v. Lewis, 415 Mich 443, 330 N.W. 2d 16 (1982).***
>
> **(W)e conclude that when an accused is charged with an offense that has as an element commission of a predicate offense the jury's consideration of the charged predicate offense and its consideration of that offense again in the context of a compound offense are separate and distinct. The**

jury's decision regarding the predicate offense does not preclude it from reaching a different conclusion in the context of the compound offense.

(O)ur conclusion that the doctrines of res judicate and collateral estoppel cannot be invoked to preclude a defendant in a criminal case from contesting an essential element of a charge finds support not only in the decision of the New Jersey Supreme Court in ***State v. Ingenito***, relied on by the Court of Appeals, but also in a recent decision of the United States Court of Appeals for the Third Circuit, ***United States v. Pelullo, 14 F.3d 881 (C.A.3, 1994).***

(W)hile the United States Supreme Court has not squarely addressed the question whether a criminal defendant may be estopped from contesting an essential element of a charged offense, there is reason to believe that the Court would not allow this use of collateral estoppel. In ***Simpson v. Florida, 403 U.S. 384, 386, 91 S.Ct. 1801, 1802-03, 20 L.Ed.2d 549 (1971),*** . . . The Court observed:

> And, had the second trial never occurred (i.e., had the prosecutor obtained a conviction for the robbery of the first person and then proceeded to try the defendant for the robbery of the second person that arose out of the same transaction), the prosecutor could not, while trying the case under review, have laid the first jury verdict before the trial judge and demanded an instruction to the jury that, as a matter of law, petitioner was one of the armed robbers in the store that night.

More recently, in ***United States v. Dixon, 509 U.S.____, n.15, 113 S.Ct. 2849, 2863-2964 n.15, 125 L.Ed.2d 556, 577, n.15 (1993),*** Justice Scalia, writing for four justices, observed that:

> Under ***Ashe v. Swenson, 397 U.S.436, 90 S.Ct.1189, 25 L.Ed.2d 469 (1970),*** an acquittal in

> the first prosecution might well bar litigation of certain facts essential to a second one-though a conviction in the first prosecution would not excuse the Government from proving the same facts the second time. (Emphasis added).

People v. Darryl S. Goss, 446 Mich. 587, 521 N.W.2d 312, 315-318 (1994), emphasis added.

The prosecution's reliance on ***People .v. Ford, 65 Cal 2d 41, 52 Cal. Rptr. 228, 416 P.2d 132 (1966),*** is erroneous. Although it appears at first blush to be similar to this case, it is distinguished in that the main issue presented in Goss is noticeably missing. The California Court was not presented with, and did not address the issue of res judicata/collateral estoppel in the context of whether prosecutorial use of res judicata infringes on a defendant's constitutional due process, presumption of innocence and right to trial by jury. ***Ford*** focused on whether prosecutorial use of collateral estoppel/res judicata would jeopardize the defense of diminished capacity. In contrast, Respondent Goss' defense of mistaken identity would be slashed, rendered totally useless if the prosecution were allowed to foreclose the jury from consideration of the armed robbery element of the felony- murder.

Justice Levin calls attention to the recent case of *Guiterrez v. Superior Court, 24 Cal.App. 4th 153, 29 Cal.Rptr. 2d 376, 386-387 (1994),* where the California courts have revisited Ford, and have distinguished it from *Guiterrez* and cases such as respondent's. Justice Levin states:

> The court said that *Ford* was not controlling because, in *Ford,* the application of collateral estoppel did not prevent the defendant from presenting his diminished capacity defense to the felony-murder charge. *Guiterrez,* however, would have been precluded from presenting his main defense-mistaken identity-if he had been estopped from contesting the identity issue. Here, as in *Guiterrez,* and in contrast with *Ford,* the application of collateral estoppel would prevent Goss from presenting his primary defense to the charges.
>
> The Court in *Guiterrez* noted that the defendant in *Ford* did not raise a constitutional claim. The Court said that *Ford* therefore does not stand for the proposition that applying collateral estoppel against a defendant is constitutionally permissible.[27] The court added that "(i)t must also be remembered that *Ford* was decided before *Ashe* and *Simpson* questioned the ability of the prosecution to invoke collateral estoppel against a criminal defendant." 20 Cal.Rptr.2d at 386.

People v. Darryl Goss, Id., p. 320.

Finally: The prosecution repeatedly fails to comprehend that it lacks any constitutional foundation to invoke use of collateral estoppel/res judicata in a

criminal proceeding. There is no constitutional mandate for "judicial economy".

The constitutional foundation for utilization of collateral estoppel/res judicata in criminal law, is embodied in the protection afforded defendants by the Double Jeopardy Clause in the Fifth Amendment of the United States Constitution, applicable to the states pursuant to the Fourteenth Amendment. *Simpson v. Florida, 403 U.S. 384, 29 L Ed. 2d 549, 91 S. Ct. 1801 (1971); U. S. Const., Am V; Am XIV.* It is also recognized in the Constituion of the *State of Michigan. Const 1963, art 1, Sec. 15.*

The constitutional protection of collateral estoppel, through double jeopardy is not extended to the prosecution. Collateral estoppel is available to the defendant, as a defense.

It has been held: "In the recent case of *Ashe v. Swenson, 397 U.S. 436, 25 L.Ed.2d 469, 90 S.Ct. 1189 (1970),* the Supreme Court reinforced the view generally recognized in the courts that collateral estoppel is available to the

defendant as a defense in criminal trials". *United States v. Bruno, 333 F. Supp. 570 (DC Pa, 1986).*

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William K. Suter, Clerk
SUPREME COURT OF THE UNITED STATES
Office of the Clerk
Washington, DC 20543-0001

March 17, 1995

Re: **MICHIGAN V. DARRYL STEVEN GOSS**
No: 94-1003

Dear Mr. Suter:

Enclosed for filing with your Court, please find:

Respondent's Motion to Proceed in Forma Pauperis
Respondent's Affidavit in Support of Motion
Order of Appointment of Counsel
Proof of Service

Respondent's Brief in Opposition
Proof of Service

Sincerely,

Angela Palmieri
AP/ap
encls.
cc: Mr. Darryl S. Goss
Timothy Baughman